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In The

Supreme Court of the United States

October Term, 1995

BROWN HARRIS II, TRUSTEE
FOR THE CHRISTOPHER HARRIS TRUST,

Petitioner,

vs.

THE MISSOURI DEPARTMENT OF CONSERVATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Missouri

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD S. REED, JR.*
STEPHEN J. BRIGGS
CREATH S. THORNE
MORTON, REED & COUNTS
320 Robidoux Center
St. Joseph, Missouri 64501
Telephone: (816) 232-8411
Attorneys for Respondent
The Missouri Department
of Conservation

(*Counsel of Record)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Missouri Supreme Court act properly in upholding the enforcement of regulations affecting wild fish owned by and titled in the State of Missouri?

II. Did the Missouri Supreme Court act properly in finding that a taking had not occurred where Petitioner failed to demonstrate that it had any reasonable investment-backed expectations?

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ADOPTION OF JURISDICTIONAL STATEMENTS

Pursuant to Rule 24.2, Respondent adopts Petitioner's statements of opinions below, jurisdiction, constitutional provisions, and appendix.

STATEMENT OF THE CASE

Constitutional and Statutory Authority for the Regulation of Wildlife and Fish Resources by the Department of Conservation.

Title to wildlife and fish within the state is vested exclusively in the State of Missouri. Mo. Rev. Stat. § 252.030. Section 252.030(3) defines "wildlife" to include "all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification. . . . " Anyone taking fish within Missouri is deemed to have consented that title to those fish remains with the state for the purpose of regulation. Mo. Rev. Stat. § 252.030.

In 1978, the Commission adopted 3 C.S.R. 10-11.805(39) which defines "waters of the state", thereby determining bodies of water falling under the jurisdiction of the Conservation Commission.

3 C.S.R. 10-11.805(39) states as follows:

> **WATERS OF THE STATE:** All rivers, streams, lakes and other bodies of surface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely upon lands owned or leased by a single person or by two or more persons jointly or as tenants in common and including

> waters of the United States lying within the state. Waters of the state will include any waters which have been stocked by the state or which are subject to movement of fishes to and from waters of the state.

King Lake – Its Location, Construction, and Connection with Other Streams and Rivers.

King Lake is a part of the Grindstone-Lost-Muddy Creek Watershed District in northwest Missouri. Tr. 544. Lost Creek originates approximately two miles above King Lake. Pl. Ex. 44. Lost Creek continues below King Lake and eventually reaches the Grand River, which flows into the Missouri River. Tr. 158. King Lake was created by the construction of a dam across Lost Creek. Tr. 72. King Lake was not designed as a commercial fishing operation. Tr. 105.

King Lake is like most soil conservation lakes in that the original purpose of the lake was to control erosion. The size of the lake was increased to provide recreational opportunities. As a result of the dam across Lost Creek, a 230-acre lake was created. Def. Ex. 13 and 14. The dam which created King Lake contains a "drop tube" as well as an overflow spillway to release water. Tr. 90. Any such water flowing out of King Lake flows into Lost Creek below the dam and eventually into the Missouri River. Tr. 158.

Before construction on any watershed district lake project is initiated, it is necessary to obtain easements from all landowners who might be affected by the lake. Tr. 563. In the case of King Lake, that meant obtaining easements not only from King Lake, Inc. but also twelve

easements from residents in Gentry County. Tr. 564, Def. Ex. 1-12.

The purpose of obtaining such easements is to prevent future complaints or litigation by landowners based on the fluctuating size of King Lake. Tr. 563. It is undisputed that neither King Lake, Inc. nor the Harris Trust owned or leased any real property in Gentry County. All of the real property owned by King Lake, Inc. and the Harris Trust is located in DeKalb County, Missouri. Tr. 96.

Even at the normal pool shown on the as-built plans (Def. Ex. 13), King Lake extended into Gentry County. Tr. 561. The flood pool boundary as shown on the as-built plans clearly extended into Gentry County and is one of the reasons that additional easements were obtained in Gentry County. Def. Ex. 13.

The Source of and Movement of Fishes Between King Lake and Lost and Willow Creeks.

It is undisputed that neither the Conservation Department, King Lake, Inc., nor the Harris Trust stocked King Lake prior to the purchase of King Lake by the Conservation Commission in 1984. Tr. 95. Similarly, no one disputes that there were, in fact, fish in King Lake prior to 1984.

Dr. William Pfleiger, a witness for respondent who is recognized as Missouri's leading ichthyologist, (Def. Exs. 38, 39, 40, 41, 42), gave extensive testimony concerning the type, characteristics and habitat of fish native to streams like Lost and Willow Creeks. Tr. 782, 783, 802, 803, 807, 808, 810, 812, 813, 814. His opinion that the source of the fish found in King Lake was the fish in Lost

and Willow Creeks at the time the dam was erected was uncontroverted at trial. Tr. 816. Dr. Pfleiger also stated that the type of fish found in King Lake and Lost and Willow Creeks would move between the lake and the creeks above the lake. Tr. 816.

Lack of Investment-Backed Expectations.

The property previously owned by King Lake, Inc. and subsequently purchased by the trust consisted of approximately 888 acres of land. Tr. 219. While King Lake, Inc. owned the property, it was used for general crop farming and water fowl hunting. Tr. 78, 98. King Lake, Inc. sold the property to the Harris Trust in early 1980 for $621,000.00. Pl. Ex. 6.

The Trust did not make any improvements to the property after the purchase from King Lake, Inc. Tr. 287. The sources of income from the King Lake property included farming income of $20,000.00-$25,000.00 per year, hunting club lease income of $5,000.00 per year and boating club income of $2,500.00 per year. Tr. 220, 303.

Mr. Brown Harris, II trustee of the Harris Trust, testified that he thought the King Lake property had "numerous possibilities." Tr. 203, 204. These "possibilities" included a golf course, a housing development and the generation of electricity. Tr. 204. The golf course and housing development proposals would include the lake itself for recreational and aesthetic reasons. Tr. 312, 316. Although Mr. Harris had discussions with two possible developers, no formal plats or plans for such a development were ever made. Tr. 314. Mr. Harris

acknowledged that he did not think that commercial fishing would preclude a golf course/housing development from taking place. Tr. 313. He also testified that any actions taken by the Department did not prevent 1) use of King Lake for irrigation purposes, 2) use of the surrounding property for farming, 3) use of the lake by the boating club or 4) use of the property for hunting purposes. Tr. 317, 318.

Mr. Harris investigated the idea of using the lake for the generation of electricity. Tr. 316. The lake was also used by the Trust as a source for irrigation of surrounding crop land, thereby increasing its productivity. Tr. 315.

Prior to the Trust's purchase of the King Lake property, Mr. Harris had never been involved in a commercial fishing venture. Tr. 287. Mr. Harris admitted that prior to the purchase, he had not:

1. Discussed the feasibility of commercially fishing King Lake with anyone involved in the commercial fishing business;

2. Conducted any actual studies of a commercial fishing operation on King Lake;

3. Contacted any governmental agencies concerning the possibility of commercially fishing King Lake;

4. Made any formal income and expense projections for a commercial fishing operation on King Lake;

5. Made any studies of the potential market for the fish being purchased from King Lake in a commercial fishing venture;

6. Contacted any commercial fishermen concerning a commercial fishing business on King Lake;

7. Consulted or contacted any banker or lender concerning an operating loan for a commercial fishing business on King Lake;

8. Read any books concerning commercial fishing operations; or,

9. Made any investment in commercial fishing equipment. Tr. 287, 290.

Neither did the Trust engage in any of the above-referenced activities during the Trust's first year of ownership of the King Lake property. Tr. 290. No attempts were made by the Trust to commercially fish the lake during the first year after the purchase from King Lake, Inc. Tr. 290. Similarly, during the second year of ownership, no commercial fishing feasibility studies were made, no contacts were made with commercial fishing operations to discuss development of commercial fishing on King Lake, no contacts were made with governmental agencies concerning commercial fishing possibilities on King Lake, no efforts were made to discuss operational loans with any lender, no investment was made in commercial fishing equipment, and no attempt was made to commercially fish King Lake. Tr. 291, 292.

The only action which Mr. Harris undertook in the second year was to discuss the idea of a commercial fishing operation with his friends at work. This discussion with friends at work involved a concept of using a deep-fat fryer to fry the fish and sell to the public in

Kansas City, Missouri, a city approximately 90 miles from King Lake. Tr. 292.

Petitioner's commercial fishing expert, James Kahrs, testified that there was no track record for raising catfish in impoundments of 200 acres or more. Tr. 456. He further stated that such a plan would be speculative. Tr. 458.

Attempts by Plaintiff to Commercially Fish King Lake.

In May or June of 1983, Mr. Harris contacted Jackie Shields, a commercial fisherman and hired him to remove fish from King Lake. Tr. 295. Mr. Shields did remove fish from King Lake. Subsequently, the local Conservation Agent issued tickets to Mr. Shields and Mr. Harris in his capacity as trustee of the Trust.

In May of 1984, Mr. Harris requested and was granted the right to appear before the Conservation Commission to present his complaint. Pl. Ex. 48; Tr. 272. In his letter requesting this hearing, Mr. Harris specifically indicated he was looking for a "quick and lasting settlement" to the problem. Pl. Ex. 48. At the May 1984 hearing before the Conservation Commission hearing, Mr. Harris made a presentation and offered to sell the King Lake property to the Department for $1,000,000.00. Tr. 273. In a subsequent executive session, the Commission agreed to offer to purchase the property from the Harris Trust for $750,000.00. Tr. 278. This offer was accepted by the Trust and a standard real estate contract containing no reservation of rights was signed by the Harris Trust and the Department. Pl. Ex. 19. The contract also allowed the Trust to retain the benefits of the current farm crop located on the property. Pursuant to that contract, the Trust was paid

$750,000.00 in August of 1984 for the property which the Trust had purchased in early 1980 for $621,000.00 – a return of approximately twenty percent in less than a four-year period.

The Role and Effect of Regulations on the Management of Fish and Wildlife Resources.

Through rules and regulations, the Department of Conservation has developed and maintained a prosperous fish and wildlife population throughout the state. Tr. 650, 651. The enhancement of these populations has resulted in significant economic benefits for the State of Missouri. Def. Exs. 19 and 20; Tr. 662, 664, 665.

The "waters of the state" regulation was promulgated to clarify the Department's jurisdiction over those bodies of water in which the fish of Missouri are to be found. Def. Ex. 23. In those bodies of water in which there is movement of fishes to and from waters of the state, the waters of the state regulation promoted substantial state interests by:

1. Enabling the Department to enforce the state's rights and interests in fish and other wildlife titled in the state. Tr. 683, 685.

2. Maintaining appropriate fish populations throughout the state's inter-connected hydrological system. Tr. 674, 675.

3. Insuring that the shared aquatic environment within the state and the fish and wildlife resources associated with that environment are properly managed in a systematic way. Tr. 683.

REASONS FOR DENYING THE WRIT

In this case, the courts below found that the State of Missouri properly regulated the taking of wild fish owned by the State of Missouri. Petitioner was not deprived of substantial economic use of King Lake and had no investment-backed expectations in King Lake. The "denominator" issue was not raised below and is not presented by the facts of this case.

I. THE FACTS OF THIS CASE DO NOT PRESENT THE COURT THE OPPORTUNITY TO CONSIDER WHETHER DENIAL THROUGH REGULATION OF AN ECONOMIC USE OF A PORTION OF A PROPERTY CONSTITUTES A TAKING.

Petitioner claims that the Court should grant a writ of certiorari in this case so it might consider the "denominator" problem in arriving at a "deprivation" fraction to determine when economically viable use of property has been denied and regulatory taking has occurred. The facts of this case, however, will not support such consideration.

A. The Department of Conservation of the State of Missouri Only Sought Regulation of Wild Fish Titled in the State.

In Missouri, wildlife, including wild fishes, is titled in and owned by the State of Missouri. Mo. Rev. Stat. § 252.030; App. 30. The constitution of Missouri mandates that the state regulate the use and taking of such wildlife.

Mo. Const. Art. 4, §§ 40-46; App. 29. Such regulations have long been upheld by this court.[1]

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[1] Mo. Rev. Stat. § 252.030 vests title in the State of Missouri to all the wildlife found within the state:

> 252.030. **Wildlife of Missouri – ownership and title.** The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the State of Missouri.

Section 252.020(3) defines "**wildlife**" to include "all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification. . . . "

Such ownership extends to *all* wildlife of and within the State of Missouri. *See, e.g., State ex rel. Wear v. Springfield Gas & Electric Co.*, 204 S.W. 942 (Mo. Ct. App. 1918) (statute vests ownership of and title to fish in state without regard to character of stream or creek in which the fish may be). Owners of private property on which wildlife may be found are *not* exempted and are deemed to have consented to the state's ownership. *State v. Taylor*, 214 S.W.2d 34 (Mo. 1948) (the title of fish asserted by the statute to be in the state for purposes of preservation, propagation, and protection is not inconsistent with the qualified special property right of the owner of the land).

This Court has found such vesting of ownership and its concomitant regulation of such property a proper and constitutional assertion of the state's authority. In *LaCoste v. Department of Conservation*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924) this Court held as follows:

> The wild animals within [a state's] borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all its people. Because of such ownership, and in the exercise of its police power, the state may regulate and control the taking, subsequent use, and property rights that may be required therein.

The trial court specifically found that the 230-acre lake was part of a natural watershed in northwest Missouri with natural streams flowing into it and overflow flowing out into other natural streams. App. 19. The trial court further found that the "fish found in King Lake during the time it was owned by [petitioner] were native fish which originated in Lost Creek [one of the natural streams]". App. 25.

The regulation of which petitioner complains did no more than permit the department to regulate the commercial taking of native fishes owned by the state. Strictly speaking, no property right of petitioner has been limited or restricted, since commercial fishing of native fishes not owned by petitioner was the only activity limited. The specific property in question – the wild fishes of Missouri – was the only property regulated, and petitioner was free to make use as it saw fit of the 230-acre lake.

Id. at 439. Similarly, in *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 49 S.Ct. 1, 73 L.Ed. 147 (1928) this court held that

> the authority of the State to regulate and control the common property in game is well established . . . . [T]he State owns, or has power to control, the game and fish within its borders not absolutely or as proprietor or for its own use or benefit but in its sovereign capacity as representative of the people.

Id. at 153. *See also Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772 (1936) (state has supreme control over fish found within the waters of the state).

B. Petitioner Was Not Deprived of All Economic Use of the Lake Itself.

For a "denominator" issue to be present, there must exist a tract of land, a portion of which has been denied economically viable use by its owner through regulation. *See, e.g., Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). Thus, in *Loveladies Harbor, Inc.*, on which petitioner relies, the issue was whether a 12.5-acre plot, which had been denied a permit for development and lost thereby 99% of its value, should be considered as part of a larger 250-acre tract, other portions of which had been developed.

This factual pattern is not to be found in this case. The trial court specifically found that the petitioner was not deprived of other economic use of the 230-acre lake itself. The economic uses intended by petitioner for the lake itself included the following:

- boating rights;
- hunting rights;
- sport fishing rights;
- generation of hydroelectric power;
- irrigation.

App. 37-38.

The trial court also found that "commercial fishing constituted only a very small portion of the Trust's plans for use of the property and that the plans for such fishing came as an afterthought when the Trust began experiencing financial difficulties." App. 38. The trial court further found that "King Lake retained the vast majority of its

economically viable use even though commercial fishing was prohibited." App. 38. These specific findings by the trier of fact defeat petitioner's assertion to this court that it was denied all economic use of King Lake.

Further, the trial court followed the mandate of this court, *see, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), in conducting case-specific inquiry and in balancing the public interests of Missouri against the private economic interests of petitioner in light of the criteria set forth in *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987). The trial court specifically found that

> [N]o physical invasion of the plaintiff's property has occurred. The non-physical regulation of wild fish belonging to the State of Missouri impinges far less upon the plaintiff's use of its property than regulations previously upheld by the Supreme Court.

App. 37.

Thus, when there has been such limited regulation of a portion of property, the threshold requirements for consideration of a "denominator" issue have not been reached.

C. Petitioner Seeks to Bring Before This Court Error Not Asserted Before.

Petitioner now abandons before this court the theory of the case it argued below, as it seeks to transmute this case into one under which the "denominator" issue needs to be addressed. To do so, it now acknowledges the

validity of the regulation at issue and seeks to challenge the impact of the regulation. Pet. Brief at 13-14. This position is totally contradictory with the theory of the case adopted by the petitioner below. Previously, petitioner took the position that the Department's commercial fishing regulations were unconstitutionally vague and served no legitimate public interest. *See, e.g., Harris v. Department of Conservation,* 895 S.W.2d 66, 70-72 (Mo. Ct. App. 1995); App. 7-14. Petitioner's points on appeal to the appellate courts of Missouri did not raise the "denominator" issue. Accordingly, the issue has not been preserved for review by this court. *See Youakim v. Miller,* 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) (ordinarily, Supreme Court does not decide questions not raised or resolved in lower court); *Lawn v. United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958) (court will review questions not raised in court below only in exceptional cases); *California v. Taylor,* 353 U.S. 553, 77 S.Ct. 1037, 1 L.Ed.2d 1034 (1957) (same).

D. Petitioner Had No Investment-Backed Expectations in King Lake.

The "denominator" problem does not affect the holdings of this court that a central criterion of whether regulatory taking has occurred is the extent to which the regulation interfered with distinct investment-backed expectations. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 175, 100 S.Ct. 383, 390, 62 L.Ed.2d 332 (1979); *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64

L.Ed.2d 741 (1980); *Keystone Bituminous Coal Ass'n v. De Benedictis*, 480 U.S. 470 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). If petitioner had no reasonable investment-backed expectations, the "denominator" issue should not be reached.

In fact, the trial court found that "plaintiff failed to prove that its investment-backed expectations as to commercial fishing were reasonable." App. 38. Instead, the trial court found "that the plaintiff's expectations were highly speculative and conjectural [and that] the proposed plan for commercial fishing of King Lake was experimental, untested and unproven." App. 38. Thus, the trial court concluded "that plaintiff failed to prove at trial that its investment in King Lake was undertaken in order to further a commercial fishing operation." App. 39. The trial court also found as follows:

> [P]laintiff purchased the property in early 1980 for the sum of $621,000.00 and sold it in 1984 for $750,000.00 without making any improvements to the property. The court finds and concludes that any expectations of the plaintiff as to any value of the property beyond $750,000.00 are indistinct, unreasonable, speculative and unproven.

App. 39.

These findings were not found to be in error on appeal. The court of appeals also raised (but found it unnecessary to decide) the question of whether a sale at a profit could ever support a claim of interference with one's investment expectations. *Harris*, 895 S.W.2d at 69; App. 5. In short, petitioner's failure of proof at trial as to

investment-backed expectations should prevent this court from ever deciding any "denominator" issue in this case.

E. Missouri Does Not Grant a Property Interest in Wildlife to Owners of Private Property on Which Wildlife is Found.

As one of its reasons for this Court to grant certiorari, Petitioner asserts that a lake is a specific property interest which has been recognized and historically protected in Missouri. Pet. Brief at 14, 15. Petitioner's argument widely misses the mark.

The "property" at issue in this case is the wild fishes of Missouri. The State of Missouri does not grant a property interest in such wildlife to the owners of private property on or in which it is found. Missouri has a long and well established history of protecting and conserving the wildlife of the state.

Title to wildlife and fish within the state is vested exclusively in the State of Missouri. § 252.030 R.S.Mo. Anyone taking fish within Missouri is deemed to have consented that title to those fish remains with the state for the purpose of regulation. As found by the trial court such consent extends to all wildlife of and within the State of Missouri. *See, e.g.,* n. 1 *supra*. Such statutes protecting wildlife and regulating the taking of fish and game have long been a part of Missouri's statutory scheme. *See, e.g.,* Mo. R.S.A. § 8971.2., *et seq.*

The vesting of ownership of wildlife in the state has long been recognized by the courts of Missouri. In *State v.*

Heger, 93 S.W. 252 (Mo. 1906), the Missouri Supreme Court noted:

> The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the state, and that such is not the subject of private ownership.

Id. at 253. In further discussing the concept of ownership of wildlife vesting in the state, the *Heger* court cited *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed. 793 (1895). In the *Geer* case, Mr. Justice White stated:

> From the earliest traditions the right to reduce animals ferae naturae to possession has been subject to the control of the law giving power.

Id., 161 U.S. at 522; *See also* cases cited at n. 1, *supra*.

The trial court specifically found that the fish in King Lake were wild fishes and were titled in the State of Missouri. App. 34. Under the statutory scheme in effect in Missouri and the long-recognized doctrine of ownership of wildlife vesting in the State, Petitioner is deemed to have consented that title to the fish in King Lake remains with the State of Missouri for purposes of regulation.

Having so consented, Petitioner had no property interest in the fish being regulated by the State of Missouri. It follows, therefore, that regulation of the fish in King Lake by the State cannot lead to a compensable taking in favor of Petitioner.

Under the set of facts presented in this case, Petitioner's reliance on *Dennig v. Graham*, 59 S.W.2d 699 (Mo. Ct. App. 1933); *Bohanan v. Camden Bend Drainage District*, 208 S.W.2d 794 (Mo. Ct. App. 1948) and *City of Blue*

Springs v. Central Development Association, 831 S.W.2d 655 (Mo. Ct. App. 1992) is misplaced. *Dennig* involved a landowner who filed suit to enjoin the defendant from trespassing on his property. The landowner also annually stocked the stream in question with over 100,000 trout. The case did not involve the enforcement of any regulation of fish by the State of Missouri.

In the *Bohanan* case, the defendant drainage district had prepared a drainage plan which would virtually drain the lake at various times throughout the year. The plaintiff argued that such draining constituted a taking. As in *Dennig*, however, *Bohanan* did not involve regulation of wild fish by the State of Missouri.

Finally, the *City of Blue Springs* case on which Petitioner relies involved the condemnation of an *underground* water source. The issue decided by that court concerned whether the value of the underground water could be separated from the value of the land under which it flowed. The court concluded that "water is not severable from the land through or under which it flows." *Id.* at 659. Although the *City of Blue Springs* court did state that a landowner could convey his right to use the water, Pet. Brief at 15, it also held that the landowner could *not* convey the water itself. *Id.* The *Blue Springs* case did not involve wild fish or their regulation by the State of Missouri.

In summary, the cases cited by Petitioner do not address the issue of the regulation of wild fish by the State of Missouri and are readily distinguished on their facts. Petitioner had no property interest in or to the wild fish of the State of Missouri. Having no interest in such

fish, Petitioner has not suffered a taking by the state's regulation of its wildlife resources.

F. The Boundaries of King Lake Extended Beyond Ownership of Petitioner, Further Subjecting the Lake to State Regulation.

The trial court specifically found that petitioner did not show that "King Lake was entirely confined on land owned or leased by" petitioner. App. 42. This finding was upheld by the court of appeals. *Harris*, 895 S.W.2d at 70; App. 7. Thus, the lake was further subject to regulation by the department, since the lack of total ownership rendered it a "water of the state" pursuant to Missouri's Wildlife Code, 3 C.S.R. 10-11.805(39).

Such regulation was specifically found by the trial court to further "the department's jurisdiction over those bodies of water comprising as a whole the hydrologic system of the State of Missouri and in which the fish of Missouri to be found." App. 33. These specific factual findings support on alternate grounds the regulation by the department of commercial fishing of King Lake and alone would prevent any recovery by petitioner.

II. THE JUDGMENT OF THE MISSOURI SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

Petitioner claims that the Missouri Supreme Court has placed itself in conflict with this court by holding that Missouri "will not find a taking so long as the regulation

advances a legitimate state interest regardless of the regulation's impact." Pet. Brief at 17.

Petitioner's claim is not supported by the record in this case, and Missouri has not so held. In the final portion of its opinion, the court below considered petitioner's claim that a taking occurred "because the application of the regulation denies Trust *all* commercial use of King Lake." *Harris*, 895 S.W.2d at 73; App. 14. The court below after first noting that it had already concluded that the regulation in question advances legitimate state interest, then turned to the question of deprivation of economic use. It concluded as follows:

> [T]he burden of proof is heavy on Trust to prove **all** economic use was denied. *Keystone* at 130-31. This Trust cannot do. Basically, the rule is as follows: where a landowner has a full "bundle" of property, the loss of one "strand" of the bundle is not a "taking" because a majority of the property remains. *Andrus v. Allard*, 444 U.S. 51, 65-66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979).
>
> Trust was not denied all economic use of the property, as there was evidence the commercial fishing use was only a small portion of the use of the property.
>
> The denial of the commercial fishing on King Lake was **not** the denial of all economic use of Trust's property, meeting the standards of *Keystone* and *Andrus*, respectively. Thus, there was no compensable "taking."

Harris, 895 S.W.2d at 73; App. 14-15 (emphasis in original).

This is the actual holding of the Missouri court on the issue of deprivation of economic use. It is not in conflict with decisions of the United States Supreme Court but, instead, succinctly summarizes existing law. Petitioner's claim must be denied.

Respectfully submitted,

RONALD S. REED, JR.*
STEPHEN J. BRIGGS
CREATH S. THORNE
MORTON, REED & COUNTS
320 Robidoux Center
St. Joseph, Missouri 64501
Telephone: (816) 232-8411
Attorneys for Respondent
The Missouri Department
of Conservation

(*Counsel of Record)